

## REMARKS

This amendment is submitted in reply to the non-final Office Action mailed on February 6, 2006. No fee is due in connection with this Response. The Director is authorized to charge any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 112701-584 on the account statement.

Claims 1 and 6-21 are pending in this application. Claims 2-5 were previously canceled. In the Office Action, Claims 1 and 6-21 are rejected under 35 U.S.C. §103. For the reasons set forth below, Applicants respectfully submit that the rejection should be withdrawn.

In the Office Action, Claims 1 and 6-21 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 3,508,926 to Werbin et al. ("*Werbin*"). Applicants believe this rejection is improper and respectfully traverse it for at least the reasons set forth below.

Independent Claims 1 and 16 recite, in part, a biscuit-like mass comprising a mixture consisting essentially of particles of baked biscuit and at least one fat. Applicants respectfully submit that *Werbin* teaches away from the present claims and that all of the claimed elements are not taught or suggested by *Werbin*.

In the Office Action, the Patent Office construes the phrase "consisting essentially of" in Claims 1 and 16 as equivalent to the term "comprising." See, Office Action, page 2, lines 16-19. Applicants respectfully disagree with the Patent Office's assertion regarding the interpretation of the phrase "consisting essentially of." Indeed, as the Patent Office admits (Office Action, page 2, lines 16-22), the language limits the scope of the claims to the specified materials and those that do not materially affect the basic and novel characteristics of the claimed invention. See, MPEP 2111.03.

In Claims 1 and 16, the specified materials of the mixture are particles of baked biscuit and at least one fat. Applicants submit that the addition of an emulsifier as disclosed by *Werbin* would materially affect the basic and novel characteristics of the claimed invention because water is also required when using an emulsifier. For example, *Werbin* teaches that water is added to form a product of usable viscosity. See, *Werbin*, column 3, lines 1-10. Further, all of the examples in *Werbin* require a water content and an emulsifier content. See, *Werbin*, column 3, Tables 1-2. By contrast, no water is added to the claimed biscuit mass because, for example,

doing so would dramatically increase the viscosity of the mass and disturb processing it as a coating, core or inclusion. See, specification, page 5, line 31 to page 6, line 2. As a result, the addition of ingredients such as emulsifiers or water as taught by *Werbin* in the claimed mixture consisting essentially of particles of baked biscuit and at least one fat would materially affect the basic and novel characteristics of the claimed invention.

In view of the proper scope of Claims 1 and 16, Applicants respectfully submit that *Werbin* teaches away from the present claims. For example, *Werbin* teaches at least one emulsifier mixed with the comminuted food particles. See, *Werbin*, column 2, lines 37-40. Further, in *Werbin* the emulsifier is applied in the form of a melted mixture with the shortening to the baked biscuit in order to coat the particles and the resulting coated particles are subsequently agglomerated with the aid of water “to form a homogeneous product of usable viscosity.” See, *Werbin*, column 2, line 62 to column 3, line 4. Although this can result in adding less water to form a product of satisfactory consistency, *Werbin* teaches that some water must be added to its product. As discussed previously, no water is added to the claimed biscuit mass because, for example, doing so would materially affect the claimed biscuit mass by dramatically increasing the viscosity of the mass and disturbing the processing of it as a coating, core or inclusion. See, specification, page 5, line 31 to page 6, line 2.

Moreover, Example 3 in *Werbin* dealing with the preparation of inclusions for using together with ice cream teaches mixing ice cream cone wafer chips with an emulsifier and fat, adding cane syrup and water, kneading the resulting composition, extrusion-cooking the mixture, cutting the extrudate into pieces and finally drying the pieces to obtain a confectionery product that is used as topping for ice cream. This again teaches away from the processes of the present invention where no water is added. As a result, one having ordinary skill in the art would not be motivated to arrive at the present claims in view of *Werbin*.

Applicants also respectfully submit that *Werbin* fails to disclose or suggest every element of the present claims. For example, *Werbin* fails to disclose or suggest a biscuit mass comprising, in part, of a mixture consisting essentially of baked biscuit particles and at least one fat or a process of making same as required by Claims 1 and 16, respectively. Instead, *Werbin* is directed to treating particles of food material containing gelatinized starch. See, *Werbin*, column 2, lines 17-23. The food particles are coated with shortening and an emulsifier in melted form

and the food particles are agglomerated with a small amount of water, preferably in the form of a sugar syrup. It is quite clear in *Werbin*, at column 2, lines 47-53, that an emulsifier is required to obtain the desired result.

Because *Werbin* teaches a process (and resulting product) using an emulsifier and adding some water for forming the food particulates to eventually be used as particulate inclusions in an ice cream mass, *Werbin* fails to disclose or suggest every element of the present claims. For example, the claimed biscuit mass consists essentially of baked biscuit particles and at least one fat and thereby excludes an emulsifier, which also requires the addition of water. Further, the present invention does not need a rewetting or subsequent drying step as taught by *Werbin*. The cooked biscuit particulates are simply mixed with the fat in the absence of any emulsifier or additional water to produce the biscuit mass, which can be used as a coating, core or inclusion of a frozen confectionery.

For the reasons discussed above, *Werbin* does not teach, suggest, or even disclose the present claims, and thus, fails to render the claimed subject matter obvious for at least these reasons.

Accordingly, Applicants respectfully request that the obviousness rejection with respect to Claims 1 and 6-21 be reconsidered and the rejection be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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